MARS EQUITY SDN BHD

v.

TIS 'ATA' ASHAR SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
ARIFIN JAKA JCA
[CIVIL APPEAL NO: W-02-48-1998]
13 DECEMBER 2004

CONTRACT: *Performance - Reciprocal promises - Order of performance - Not fixed in agreements - Looking at 'nature of transaction' - Whether all contemporaneous agreements within transaction to be read together as a whole - Interpretation of commercial contracts in accord with 'business common-sense' - Breach of contract relating to land - Presumption of pecuniary irremediableness and specific performance - Contracts Act 1950, ss. 53, 55 - Specific Relief Act 1950, s. 11(2)*

The parties herein had earlier entered into two agreements in respect of a plot of land. One was for the transfer of the land from the defendant to the plaintiff ('the land agreement') whilst the other contemplated an application by the plaintiff for a license to fell and extract timber in connection with the land ('the timber agreement'). As it transpired, neither did the defendant transfer the land to the plaintiff nor did the plaintiff apply for a timber license. The plaintiff then brought an action for specific performance, contending that the two agreements should be construed together. Conversely, the defendant argued that the agreements, when read separately as they should be, envisaged an application by the plaintiff for a timber license first; and because the plaintiff did not so apply, the defendant had no corresponding obligation to effect a transfer of the land to the plaintiff. The learned judge found for the defendant and the plaintiff appealed. The sole issue before the justices of appeal was the order or sequence in which the promises of the respective parties were to be performed.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] Where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one. Put differently, where the arrangement between the parties is contained in several documents all of which are executed simultaneously, all the documents must be read together, and as a whole, to ascertain the intention of the parties. (p 517 c-f)

[2a] The two agreements herein, as read together, did **not** expressly fix the order in which the respective obligations of the parties were to be performed. Hence, and following s. 53 of the Contracts Act 1950, they should be performed in the order in which the "nature of the transaction" would require. (p 518 b-g)

[2b] Taking the two agreements together and reading them as a whole in the context of "the objective aim of the transaction", it was clear that the plaintiff would **not** be able to apply to the appropriate authority for a timber license unless and until it became the registered proprietor of the land. The transaction between the parties herein was a purely commercial one; hence, the correct approach would be to interpret the two agreements in a way that was consonant with 'business common-sense'. The High Court was therefore wrong in treating the two agreements as separate contracts and in dealing only with the timber agreement without regard to the land agreement. The defendant was clearly in breach of its primary obligation to transfer the land to the plaintiff; it was in **no** position to call for the performance of the plaintiff's obligation to apply for a timber license. (pp 518 g-h & 519 a-e)

[3] A breach of contract relating to land is presumed (rebuttable) to be irremediable by monetary compensation. Hence, the appropriate remedy for the plaintiff here would be specific performance of the land agreement. (pp 519 f-h & 520 a-c)

[Defendant to execute registrable memorandum of transfer to be handed over to plaintiff together with issue document of title within one month.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pihak-pihak di sini sebelum ini telah memeterai dua perjanjian berkaitan dengan sebidang tanah. Yang pertama mengenai penyerahan tanah dari defendan kepada plaintif ('perjanjian tanah') sementara yang keduanya pula menjangkakan permohonan dibuat oleh plaintif bagi mendapatkan lesen bagi menebang dan mengeluarkan kayu-kayu balak dari tanah tersebut ('perjanjian kayu balak'). Sepertimana halnya, tiada penyerahan tanah telah dibuat oleh defendan dan tiada lesen pembalakan telah dipohon oleh plaintif. Plaintif kemudian mendakwa untuk pelaksanaan spesifik, sambil berhujah bahawa kedua-dua perjanjian harus dibaca bersama. Defendan sebaliknya menyatakan bahawa perjanjian-perjanjian, apabila dibaca secara berasingan, sebagaimana ia sepatutnya dibaca, mengkehendaki supaya plaintif terlebih dahulu membuat permohonan untuk lesen; dan oleh kerana plaintif tidak berbuat demikian, maka tiada kewajipan bagi defendan untuk menyerahkan tanah kepada plaintif. Yang arif hakim membuat keputusan yang berpihak kepada defendan dan plaintif merayu. Isu tunggal yang berada di hadapan yang arif hakim-hakim rayuan adalah siapakah di antara pihak-pihak yang berjanji di sini yang harus terlebih dahulu menunaikan janjinya.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Di mana beberapa dokumen yang menjadi sebahagian dari satu transaksi dimeterai secara serentak, kesemua dokumen berkenaan hendaklah dibaca bersama seolah-olah ianya hanya satu dokumen sahaja. Dalam ertikata lain, di mana persefahaman di antara pihak-pihak dikandung oleh beberapa dokumen yang dimeterai sekaligus, kesemua dokumen tersebut mestilah dibaca bersama, dan secara keseluruhan, bagi menentukan niat pihak-pihak.

[2a] Kedua-dua perjanjian di sini, dibaca secara bersama, tidak menetapkan dengan nyata siapakah yang harus terlebih dahulu melaksanakan janjinya. Oleh yang demikian, dengan menuruti s. 53 Akta Kontrak 1950, janji-janji tersebut hendaklah ditunaikan mengikut aturan sepertimana yang diperlukan oleh 'sifat transaksi' itu sendiri.

[2b] Dengan menyatukan kedua-dua perjanjian dan membacanya secara keseluruhan dalam konteks "tujuan objektif transaksi", ianya jelas bahawa plaintif tidak akan boleh memohon lesen pembalakan dari pihak berkuasa yang relevan kecuali jika ia terlebih dahulu menjadi pemilik berdaftar tanah. Transaksi antara pihak-pihak di sini adalah semata-mata transaksi komersial; oleh itu, pendekatan yang betul adalah dengan mentafsir

kedua-dua perjanjian dengan cara yang selaras dengan 'akal budi perniagaan'. Mahkamah Tinggi dengan itu silap dalam menganggap kedua-dua perjanjian sebagai perjanjian yang berasingan dan dalam hanya menangani perjanjian pembalakan tetapi tidak perjanjian tanah. Defendan jelas telah memungkiri tanggungjawabnya untuk menyerahkan tanah kepada plaintif; ia tidak berada dalam kedudukan untuk menuntut supaya plaintif menunaikan tanggungjawabnya dengan memohon lesen pembalakan.

[3] Suatu kemungkiran kontrak berkaitan dengan tanah adalah dianggap (boleh disangkal) sebagai tidak terubat dengan pampasan wang. Dengan itu, penawar yang sesuai bagi plaintif di sini adalah pelaksanaan spesifik perjanjian tanah.

Defendan mesti menyempurnakan memorandum pindahmilik yang sah untuk diserah kepada plaintif bersama-sama dengan dokumen keluaran hakmilik dalam tempoh sebulan.]

Case(s) referred to:
Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191 ***(foll)***
Loo Choo Teng & Anor v. Cheok Swee Lee & Ors [2000] 2 CLJ 389 CA ***(refd)***
Mohamed Isa & Ors v. Abdul Karim & Ors [1970] 2 MLJ 165 ***(foll)***
Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***
Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 SC ***(refd)***
Zaibun Sai Syed Ahmad v. Loh Koon Moy [1982] CLJ 457; [1982] (Rep) 58 PC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 53, 55
Specific Relief Act 1950, s. 11(2)

Contract Act 1872 [Ind], s. 52

Other(s) referred to:
Singhal & Subrahmanyan's Indian Contract Act, 4th edn, p 984

For the appellant - Maidzuara Mohammad (Barbara Wong); M/s Logan Sabapathy & Co
For the respondent - Tommy Thomas; M/s Tommy Thomas

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-152-1994]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

This is an uncomplicated case. Its facts have been set out and discussed at length in the judgment of the High Court reported at [1997] 1 LNS 455. For present purposes, a short summary suffices.

The appellant and respondent entered into two contemporaneous agreements. One was for the transfer of land. The other was an agreement to fell and extract timber. It is the appellant's argument that both agreements should be read together. In support of her submission on the point, Cik Maidzuara relied on the following passage in the judgment of Raja Azlan Shah J (as he then was) in *Mohamed Isa & Ors v. Abdul Karim & Ors* [1970] 2 MLJ 165:

> It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one (see *Manks v. Whiteley* [1912] 1 Ch 735. This principle was followed in *Idris bin Haji Mohamed v. Ng Ah Siew* [1935] MLJ 257, where Terrell J at p. 261 said:
>
> > It is a well known rule of construction that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, and it is a corollary from this that the intention must be gathered from the documents as a whole. It has been held, for example, that when a bill of sale and a mortgage of a reversionary interest were executed simultaneously and related to the same debt, the bill of sale could be defeated by a condition contained only in the mortgage, *Edwards v. Marcus* [1894] 1 QB 587 (see also the dissenting judgment of Fletcher Moulton LJ in *Manks v. Whiteley*, which was approved on appeal to the House of Lords, sub-nominee *Whiteley v. Delaney* [1914] AC 132).
>
> In the present case, the two said permits to mine referred to the same subject matter and were substantially in identical terms except that the second permit was to take effect only a year later, that is, after the first permit had expired. In the circumstances, the two permits to mine should be read together as forming one permit to mine for a period of two years.

Under the second agreement – I will call it the "timber agreement" – the appellant was to apply for a timber licence. It did not do so. Neither did the respondent transfer the land under what I will call "the sale of land agreement". According to the appellant it had carried out its obligations under that agreement and was therefore entitled to call upon the respondent to effect a transfer in its favour. The respondent says that it is for the appellant to apply

for the licence in the first place. And, since it admittedly did not do that, there is nothing for the respondent to perform. So, this case has to do with the order in which the promises of the respective parties are to be performed. That it is the only issue in this case is common ground between the parties.

Now, the order of performance of obligations in a contract is governed by s. 53 of the Contracts Act 1950 which provides:

> 53. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

The section is ipsissima verba s. 52 of the Indian Contract 1872. In the leading textbook on the subject, *viz.*, *Singhal & Subrahmanyan's Indian Contract Act*, 4th edn, p. 984 the commentary to s. 52 reads:

> Standing alone, however, the mere order of performances in time is not always decisive of the case. The promise to render the earlier performance is not conditional on tender of an agreed equivalent by the other party; but may be conditional on other factors even though it is not expressly so provided. For example, the promisor's duty to render the earlier performance is constructively conditional on the absence of a material increase in his risk of not getting the agreed exchange. He is privileged to withhold his performance, if the other party repudiates in advance, or if, for any reason, he becomes prospectively unable to render the agreed exchange, whether because of objective impossibility, or of insolvency, or other personal inability. So, if a seller promises to ship goods on a certain day, in return for the buyer's promise to pay for them after delivery, the seller's duty to ship is constructively conditional on the buyer's prospective ability to pay. If the seller can show that the buyer will not in fact be able to pay, he is privileged not to ship; this is true, inspite of the fact that shipment is to be first in time.

In the present instance, the two agreements when read together do not expressly fix the order of performance of the parties' respective obligations. Accordingly, the nature of the transaction must be looked at to determine this.

Taking the two agreements together and reading them as a whole and in the context of what Lord Wilberforce in his speech in *Prenn v. Simmonds* [1971] 3 All ER 237 described as "the objective aim of the transaction", it is clear that the appellant cannot possibly apply to the appropriate authority for the licence until it becomes the registered proprietor of the land in question. For, it is commonsense that a non-registered proprietor has no standing to apply for the kind of licence contemplated by the timber agreement. In my judgment,

in a purely commercial transaction such as the one we have here, the correct approach is to interpret the agreements in a way that is consonant with business commonsense. As Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 at p 201:

> While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

Unfortunately, the High Court did not take this approach. It treated the two agreements as separate contracts and dealt only with the appellant's obligations under the timber agreement without having any regard to the sale of land agreement. Consequently it failed to have any sufficient regard to the order in which the parties were to perform their respective obligations. In my judgment there is therefore merit in the complaints directed at the High Court's judgment by learned counsel for the appellant.

It follows that the respondent was clearly in breach of its primary obligation to transfer the land to the appellant. Therefore it was not in a position to call for the performance of the appellant's obligation under the timber agreement to apply for the licence. The present case, in my judgment, falls plumb within s. 55 of the Contracts Act 1950. That section says:

> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.

Section 55 is, of course of general application when it speaks of the promisor having to pay compensation to the promisee. But, whether compensation is sufficient in a given case depends on the subject matter of the contract. Here the subject matter is land. A breach of a contract relating to land is rebuttably presumed to be irremediable by monetary compensation. (Section 11(2) Specific Relief Act 1950. See also, *Zaibun Sai bte Syed Ahmad v. Loh Koon Moy* [1982] CLJ 457; [1982] CLJ (Rep) 58). Having regard to the evidence before the High Court I find no material going anywhere near to rebutting the presumption housed in s. 11(2). Hence, the appropriate remedy in this case is specific performance.

For the reasons already given, I would allow this appeal and decree specific performance of the sale of land agreement. The respondent must, within one month from today execute and hand to the appellant's solicitors a registrable memorandum of transfer in the appellant's favour together with the issue document of title to the land in question. In the event of the respondent's default in so doing, the senior assistant registrar of the High Court in Kuala Lumpur shall execute such transfer and the respondent shall within seven days of such default, deposit the issue document of title to the land with the senior assistant registrar. The appellant must bear the stamp duty, the registration fee and all costs attendant upon such transfer. The parties shall be generally at liberty to apply to the High Court for the purpose of carrying this order into effect. The respondent must pay the costs of this appeal and those incurred in the court below.

One final point. During his submissions learned counsel for the respondent faintly suggested that it may not be possible for his client to effect a transfer of the land to the appellant. That of course is wholly irrelevant at this stage. In the ordinary way, it must perforce be looked into on an application made in that behalf by the appellant to the High Court at the appropriate stage. See, *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154, *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors* [2000] 2 CLJ 389.

My learned brothers Mohd Ghazali bin Mohd Yusoff and Arifin bin Haji Jaka, JJCA have seen this judgment in draft and have expressed their agreement with it.